STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

JEFFREY HAKSLUOTO
and CAROL HAKSLUOTO,

Plaintiffs-Appellants,

v

Supreme Court No. 153723
Court of Appeals No. 323987
Macomb Cir. Ct. No. 14-2556-NH

MT. CLEMENS REGIONAL MEDICAL CENTER,
N/K/A MCLAREN MACOMB,
GENERAL RADIOLOGY ASSOCIATES, P.C.,
and ELI SHAPIRO, D.O.,

Defendants-Appellees.
_____/

BRIEF ON APPEAL— PLAINTIFFS-APPELLANTS

ORAL ARGUMENT REQUESTED

Respectfully submitted,

HERTZ SCHRAM PC
By: Steve J. Weiss (P32174)
Daniel W. Rucker (P67832)
Attorneys for Plaintiffs-Appellants
1760 S. Telegraph Road, Suite 300
Bloomfield Hills, MI 48302
(248) 335-5000/Fax (248) 335-3346
sweiss@hertzschram.com
drucker@hertzschram.com

Dated: January 17, 2017

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii
STATEMENT OF ORDER APPEALED AND JURISDICTION v
STATEMENT OF QUESTIONS INVOLVED ix
INTRODUCTION 1
STATEMENT OF FACTS 4
APPLICABLE STANDARDS OF REVIEW 6
PRESERVATION OF ERROR 7
ARGUMENT 8
I. Plaintiffs Timely Served Their NOI Within The Limitations Period And Timely Filed Their Complaint Immediately After The Notice Period 9
A. The Statutes And Rules Relevant To Tolling And Limitations Periods Establish That Plaintiffs-Appellants' Complaint Was Timely Filed 10
B. Case Law Published After The Amended Tolling Statute Supports The Timely Filing Of Plaintiffs-Appellants' Complaint 14
II. The Court Of Appeals Erred In Finding That A Claim Is Barred By The Statute Of Limitations During The Available Statute Of Limitations Time Frame 20
A. Summary Of Argument In Response To The Court Of Appeals' Opinion 21
B. The Court Of Appeals Incorrectly Found That A Claim Is Barred By The Statute Of Limitations During The Available Statute Of Limitations Period 22
C. The Decision Below Reaches Beyond Medical Malpractice 30
III. Defendants' Arguments Below Were Erroneous And Unpersuasive 32
A. Defendants-Appellees Confuse The 32
B. Defendants-Appellees' Improperly Relied Upon Unpublished Case Law And Case Law Interpreting A Prior Version Of The Relevant Tolling Statute 33
C. Defendants-Appellees Ignored Substantial Precedent In Erroneously Arguing That A Medical-Malpractice Limitations Period Is Not Tolled For A Full 182 Days Following Service Of The Notice Of Intent To Sue 35
CONCLUSION 42

INDEX OF AUTHORITIES

Cases

Apsey v Mem'l Hosp, 266 Mich App 666; 702 NW2d 870 (2005) 28, 29
Apsey v Mem'l Hosp, 477 Mich 120; 730 NW2d 695 (2007) 28, 29
Bailey v Schaaf, 494 Mich 595; 835 NW2d 413 (2013) 7
Bers v Bers, 161 Mich App 457; 411 NW2d 732 (1987) 7
Brown v Northville Regional Psychiatric Hosp, 153 Mich App 300; 395 NW2d 18 (1986) 7
Bryant v Oakpointe Villa Nursing Ctr, Inc, 471 Mich 411; 684 NW2d 864 (2004), ... 28, 29
Burton v Macha, 303 Mich App 750; 846 NW2d 419 (2014) 15, 16, 42
Bush v Shabahang, 484 Mich 156, 185; 772 NW2d 272 (2009) ..... viii, 3, 10, 11, 12, 14, 25, 37
Collateral Liquidation, Inc v Palm, 296 Mich 702; 296 NW 846 (1941) 23
Creed v Walsh, 412 Mich 892; 313 N.W.2d 57 (1981) 22
Crockett v Fieger Fieger Kenney & Johnson, PC, unpublished opinion *per curiam* of the Court of Appeals, Oct. 28, 2003 (Dkt. No. 240863), 2003 Mich App Lexis 2768 ..... 15, 42
DeCosta v Gossage, 486 Mich 116, 126; 782 NW2d 734 (2010) ..... viii, 2, 12, 16, 17, 23, 25, 26
Dep't of Human Servs v Chester (In re Chester), 477 Mich 1012; 726 NW2d 411 (2007) 39
Dewan v Khoury, unpublished opinion *per curiam* of the Court of Appeals, Mar. 28, 2006 (Dkt. No. 265020), leave denied 477 Mich 888; 722 NW2d 215 (2006) 33, 34
Driver v Naini, 490 Mich 239; 802 NW2d 311 (2011) ..... viii, 6, 8, 19, 20, 26
Dunlap v Sheffield, 442 Mich 195; 500 NW2d 739 (1993) 23, 39
Fisher Sand & Gravel Co v Neal A Newbie, Inc, 494 Mich 543; 837 NW2d 244 (2013) 6
Gainforth v Bay Health Care, unpublished opinion *per curiam* of the Court of Appeals, Aug. 11, 2005 (Dkt. No. 260054), 2005 Mich App LEXIS 1952 16
Haksluoto v Mt. Clemens, __ Mich __; 886 NW2d 718 ..... 2, 3, 36, 39
Haksluoto v Mt. Clemens, 314 Mich App 424; 886 NW2d 920 (2016) ..... v, vi, 2, 3, 5, 6, 9, 16, 21, 22, 23, 25, 26, 27, 28, 31, 39, 40
Haksluoto v Mt. Clemens, unpublished order of the Court of Appeals, entered Apr. 4, 2016 (Dkt. No. 323987) v
Hanosh v Nick, 28 Mich App 383; 184 NW2d 570 (1970) 22
Hardin v Prieskorn, unpublished op. *per curiam* of the Court of Appeals, Apr. 1, 2014 (Dkt. No. 311193) 35
Huntington Nat'l Bank v Daniel J Aronoff Living Trust, 305 Mich App 496; 853 NW2d 481 (2014) 7
Joliet v Pitoniak, 475 Mich 30; 715 NW2d 60 (2006) 22
Justice v Town of Cicero, 682 F3d 662 (CA7 2012) 3, 40
Keweenaw Bay Indian Community & Keweenaw Bay Indian Tribal Council v Clarke, unpublished opinion *per curiam* of the Court of Appeals, Jan. 11, 2000 (Dkt. No. 214015), 2000 Mich App Lexis 2822 23
Kincaid v Cardwell, 300 Mich App 513; 834 NW2d 122 (2013) ..... viii, 3, 17, 18, 19, 26
Lancaster v Wease, unpublished op. *per curiam* of the Court of Appeals, Sept. 28, 2010 (Dkt. No. 291931) 35
Omelenchuk v Warren, 461 Mich 567; 609 NW2d 177 (2000) 20, 37, 38

People v Sinclair, 247 Mich App 685; 638 NW2d 120 (2001) 37, 41
People v Vandervliet, 444 Mich 52; 508 NW2d 114 (1993) 39
People v Watkins, 491 Mich 450, 472-73; 818 NW2d 296 (2012) 37, 41
Polkton Charter Twp v Pellegrom, 265 Mich App 88; 693 NW2d 170 (2005) 7
Potter v McLeary, 484 Mich 397; 774 NW2d 1 (2009) 37
Scarsella v Pollak, 461 Mich 547; 607 NW2d 711 (2000) 12, 31, 32
Shawl v Spence Bros, Inc, 280 Mich App 213; 760 NW2d 674 (2008) 39
Smith v Sinai Hosp of Detroit, 152 Mich App 716; 394 NW2d 82 (1986) 7
State ex rel Gurganus v CVS Caremark Corp, 496 Mich 45; 852 NW2d 103 (2014) 7
Swanson v Port Huron Hosp, 290 Mich App 167; 800 NW2d 101 (2010) 11
Telerico v Nowatzke, unpublished opinion *per curiam* of the Court of Appeals, Jan. 15, 2015 (Dkt. No. 318574), 2015 Mich App Lexis 41 23
Terrace Land Dev Corp v Seeligson & Jordan, 250 Mich App 452; 647 NW2d 524 (2002) 12, 31, 32
Trentadue v Gorton, 479 Mich 378; 738 NW2d 664 (2007) 6
Tyra v Organ Procurement Agency of Mich [also Furr v McLeod], 498 Mich 68; 869 NW2d 213 (2015) ..... vii, 2, 3, 16, 17, 18, 26, 38
Waltz v Wyse, 469 Mich 642; 677 NW2d 813 (2004) 3, 20, 37
Zwiers v Growney, 286 Mich App 38; 778 NW2d 81 (2009) 3, 38
Zwiers v Growney, 498 Mich 910; 870 NW2d 918 (2015) 3, 38

Statutes

MCL 600.2301 38
MCL 600.2912b ..... v, 1, 2, 12, 14, 31, 37, 38
MCL 600.2912b(1) ..... v, 3, 8, 12, 19, 31, 36, 37, 38, 41
MCL 600.5805(1) 8, 12
MCL 600.5805(6) ..... vi, 2, 8, 14
MCL 600.5838(a) 13
MCL 600.5856 ..... 10, 14, 32, 34, 37, 38
MCL 600.5856(a) ..... vii, 1, 12, 18, 31, 33
MCL 600.5856(c) ..... v, vi, vii, viii, 1, 2, 3, 4, 5, 8, 9, 11, 13, 17, 18, 19, 20, 21, 22, 24, 26, 27, 30, 33, 34, 37, 42
MCL 600.5856(d) 4, 15

Rules

Federal Rule of Civil Procedure 6(a)(1)(C) 40
MCR 1.108 ..... vii, viii, 3, 21, 24, 28, 34, 37, 39, 40
MCR 1.108(1) 1, 2, 3, 4, 5, 14, 15, 16, 25, 34, 36, 37, 39, 40, 41, 42
MCR 1.108(3) 21, 23
MCR 2.116(C)(7) 6
MCR 2.116(C)(8) 7
MCR 2.119(F) 7
MCR 2.119(F)(3) 7
MCR 7.305(B)(1) vi
MCR 7.305(B)(3) vii
MCR 7.305(B)(5)(a) vii

STATEMENT OF ORDER APPEALED AND JURISDICTION

In an order dated September 16, 2014, the Circuit Court denied Defendants-Appellees' motion for summary disposition and determined that Plaintiffs-Appellants' Complaint was timely filed in accordance with the statute of limitations. (Cir Ct Order of Sept 16, 2014, Appx. 25a-31a.) The Court of Appeals granted Defendants' application for leave to appeal on December 3, 2014. On February 18, 2016, the Court of Appeals reversed the Circuit Court and remanded for entry of an order granting summary disposition in favor of Defendants. *Haksluoto v Mt. Clemens*, 314 Mich App 424; 886 NW2d 920 (2016), Appx. 125a-129a (hereinafter also referred to as "COA Opinion".) On March 8, 2016, Plaintiffs moved for reconsideration of the COA Opinion. On April 4, 2016, the Court of Appeals denied the motion for reconsideration. *Haksluoto v Mt. Clemens*, unpublished order of the Court of Appeals, entered Apr. 4, 2016 (Dkt. No. 323987, Appx. 130a.) On May 12, 2016, Plaintiffs filed an application seeking leave to appeal to this Court. On June 9, 2016, Defendants responded in opposition to leave. On June 30, 2016, Plaintiffs filed a reply brief in support of leave to appeal. On November 23, 2016, this Court entered an order granting leave to appeal. Plaintiffs-Appellants challenge both the COA Opinion and its denial of reconsideration.

This action arose as the result of Defendants' medical malpractice. Plaintiffs mailed their notice of intent ("NOI") to sue on the final day of the two year limitations period. MCL 600.2912b (mailing notice of intent); MCL 600.5805(6) (limitations period). Plaintiffs allowed the 182-day notice period to run, and then filed their Complaint upon the immediately following day. MCL 600.2912b(1) (182 days notice). Plaintiffs argued, and the Circuit Court agreed, that the statute of limitations period was tolled on the day that Plaintiffs mailed their NOI pursuant to MCL 600.5856(c) and that Plaintiffs retained that final day of the limitations period and so were able to timely file their complaint on the day immediately following the 182-day notice period.

Therefore, the Circuit Court, Hon. Peter J. Maceroni (ret.), found Plaintiffs' complaint timely and denied Defendants' motion for summary disposition.

The Court of Appeals agreed with Plaintiffs and the Circuit Court that pursuant to MCL 600.5856(c), tolling occurs "at the time" the NOI is mailed. The Court of Appeals further noted that immediate tolling only occurs upon mailing the NOI "*if during that period [182 day notice period] a claim would be barred by the statute of limitations or repose*." *Haksluoto*, 314 Mich App at 432, Appx. 128a (citing MCL 600.5856(c), emphasis in original). The Court of Appeals' error is that it found the claim was barred for purposes of MCL 600.5856(c) *while the limitations period was still open*. The Court of Appeals held that Plaintiffs mailed the NOI "on the last day of the limitations period." *Haksluoto*, 314 Mich App at 433, Appx. 128a. The Court of Appeals held that the 182-day notice period began "the day *after* plaintiffs served the NOI." *Id.*, at 432, Appx. 128a. ***Then the Court of Appeals erred by finding that "we must conclude that the statute of limitations was not tolled in this case due to the fact that it expired one day before the notice period began."*** *Id*., at 434, Appx. 128a (emphasis added). ***In other words, the Court of Appeals held that the statute of limitations would bar a claim during the available statute of limitations period***. This theory, that the statute of limitations barred a claim during the open limitations period, was never asserted by Defendants. Instead, it was a theory developed by the Court of Appeals, which reversed and remanded for entry of summary disposition on behalf of Defendants "for reasons other than those asserted by defendants." *Id*., at 428, Appx. 126a.

A holding by the Court of Appeals that a claim may be "barred" within the statute of limitations period has properly been accepted for review by this Court. The holding involves a substantial question about the validity of a legislative act (MCR 7.305(B)(1)) in that the medical malpractice two year limitations period is shortened by a day. MCL 600.5805(6). But the reach of the Court of Appeals' opinion is potentially much greater than medical malpractice. If the

Court of Appeals sets a precedent that a claim may be barred by the statute of limitations during the statute of limitations, such precedent could be reapplied in any area of law and is not limited to claims affected by MCL 600.5856(c). Indeed, *all complaints* filed on the final day of the limitations period would be forfeited if the Court of Appeals is correct that claims may "expire" and be barred on the final day of the limitations period. Nothing in MCL 600.5856(a) or (c) permit tolling of a claim that is already barred by the limitations period at the time of filing the complaint or NOI. MCL 600.5856(a),(c); *see also Tyra v Organ Procurement Agency of Mich [also Furr v McLeod]*, 498 Mich 68, 80; 869 NW2d 213 (2015) ("if the statute of limitations has already expired" prior to filing a complaint, the case "must be dismissed with prejudice").

Reversing the Court of Appeals regarding whether the last day of a statute of limitations is an available day for filing a claim is a legal matter of major significance to this state's jurisprudence. MCR 7.305(B)(3). Litigants of this state should not have to wonder whether a claim could be considered "barred" on the final day of a limitations period, whether the claim be medical malpractice involving an NOI or any other type of claim.

This Court's reversal of the Court of Appeals' opinion is also necessary because the decision is clearly erroneous and will cause material injustice. MCR 7.305(B)(5)(a). There is no basis or precedent of which Plaintiffs are aware that allow a statute of limitations to be both available and exhausted on the same day. The Court rules do not allow for such counting but deal with days as a single unit. *See* MCR 1.108. To permit the Court of Appeals' holding that the claim is barred on the last day of the statute of limitations also creates an injustice by jeopardizing untold numbers of claims for plaintiffs who, like Plaintiffs here, depended upon that final day of the limitations period to proceed with their complaints or NOIs.

The Court of Appeals' decision should also be overturned based upon its conflict with other decisions in which this Court or the Court of Appeals have held that mailing the NOI

within the limitations period is timely and is sufficient to entitle the litigant to the 182-day tolling period. *See*, *e.g.*, discussion *infra* of *Kincaid v Cardwell*, 300 Mich App 513, 523-524; 834 NW2d 122 (2013); *DeCosta v Gossage*, 486 Mich 116, 118, 126; 782 NW2d 734 (2010) (relying upon *Bush v Shabahang*, 484 Mich 156, 161, 185; 772 NW2d 272 (2009)); *Driver v Naini*, 490 Mich 239, 249; 802 NW2d 311 (2011). The Court of Appeals decision also conflicts with the court rules established by this Court in that the COA Opinion arguably requires days to be subdivided rather than counted as a single unit pursuant to MCR 1.108.

For any or all of these reasons, this Court properly determined that review is necessary. Plaintiffs respectfully request that this Court reverse the Court of Appeals' decision, reinstate the Circuit Court's opinion, and find that an NOI served on the last day of the available limitations period tolls the limitations period pursuant to MCL 600.5856(c) and leaves the plaintiff with a single day following the 182-day notice period in which to timely file a complaint.

Plaintiffs do not request that the Court ignore the statutory language upon which the Court of Appeals focused: "if during that period a claim would be barred by the statute of limitations." MCL 600.5856(c). Nor does this Court need to create an elaborate theory to circumvent the Court of Appeals' reasoning. The basis that Plaintiffs' claims are not lost to the Court of Appeals' reasoning is simple. The first day "a claim would be barred" by the limitations period was December 27, 2013, the day *after* the final day within the limitations period. The first day of the 182-day notice period was also December 27, 2013. Therefore, tolling occurred "at the time notice is given" on the last day of the limitations period because ***the "claim would be barred" and the 182-day notice period would begin at the same time on the day immediately following the last day of the limitations period***. MCL 600.5856(c). This allows the courts to strictly construe the statute without fundamentally modifying the validity and utility of the final day within a limitations period.

STATEMENT OF QUESTIONS INVOLVED

I. WHETHER PLAINTIFFS-APPELLANTS TIMELY FILED THEIR MEDICAL MALPRACTICE COMPLAINT IMMEDIATELY FOLLOWING THE 182-DAY TOLLING PERIOD AFTER SERVING A NOTICE OF INTENT TO SUE WITHIN THE STATUTE OF LIMITATIONS PERIOD?

Plaintiffs-Appellants say:	"Yes"
Defendants-Appellees say:	"No"
Circuit Court says:	"Yes"
Court of Appeals says:	"No"
Supreme Court should say:	"Yes"

INTRODUCTION

The medical malpractice at issue in this case involved, in part, the reading of a CT scan by Defendant-Appellee Eli Shapiro, D.O., on December 26, 2011. On December 26, 2013, Plaintiffs-Appellants mailed their notice of intent (NOI) to sue as required by MCL 600.2912b On June 27, 2014, Plaintiffs-Appellants filed their Complaint. The Complaint was timely filed because MCL 600.5856(c) tolls the statute of limitations "at the time" the NOI is mailed. Consequently, on the date that Plaintiffs-Appellants mailed the NOI, December 26, 2013, the statute of limitations was immediately tolled, and that final day of the available limitations period still remained available to file a complaint after the 182-day NOI tolling period. MCR 1.108(1) requires that the 182-day period of tolling begin the day after the NOI was mailed and include "the last day of the [tolling] period." The final provision of MCL 600.5856(c) requires this method of calculating the tolling period. Thus, the 182-day period is computed to begin on December 27, 2013, the day after the filing, and includes within the tolling period the date of June 26, 2014. Therefore, Plaintiffs-Appellants properly filed their Complaint on June 27, 2014, the single remaining day of the statute of limitations following the 182-day tolling period that included June 26, 2014. When the Complaint was filed on June 27, 2014, the statute was again tolled. MCL 600.5856(a). Consequently, from December 26, 2013 forward, there has never been a day when the statute of limitations was not tolled.

The case law and statutory analysis presented to the Circuit Court and this Court fully supports the analysis above. The Circuit Court properly determined that Plaintiffs-Appellants' Complaint was timely filed. The Court of Appeals' reversed and erroneously held the claim was barred by the statute of limitations period while the limitations period was still open, December 26, 2013. Yet, the first day the statute of limitations could bar a claim was the first day outside of the limitations period, December 27, 2013. The Court of Appeals held that December 27,

2013 was the first day of the 182-day notice period. Thus, reading MCL 600.5856(c) with the operative dates inserted in brackets yields the following:

> The *statute of limitations* or repose *are tolled* in any of the following circumstances:
> * * * * *
> *At the time notice is given* [**December 26, 2013**] in compliance with the *applicable notice period* under section 2912b **[December 27, 2013 through and including June 26, 2014]**, *if during that period* **[December 27 through and including June 26]** *a claim would be barred by the statute of limitations* **[December 27 and later]** or repose. [MCL 600.5856(c) (brackets and emphasis added.]

In its November 23, 2016 order granting leave to appeal, this Court specifically instructed the parties to include two issues among those to be briefed. *Haksluoto v Mt. Clemens*, __ Mich __; 886 NW2d 718, Appx. 156a (2016) (citing MCR 1.108(1) ("the period runs until the end of the . . . day")). The two issues are listed below along with short answers to both.

Issue: "(1) Whether a notice of intent under MCL 600.2912b that is mailed on what would otherwise be the last day of the limitations period of MCL 600.5805(6) tolls the limitations period, as provided by MCL 600.5856(c)." *Haksluoto*, __ Mich __; 886 NW2d 718, Appx. 156a.

Short Answer: "[I]f an NOI is timely, the period of limitations is tolled [despite defects contained therein]." *DeCosta v Gossage*, 486 Mich at 123; *see also Haksluoto*, 314 Mich App at 434-35, Appx. 129a (recognizing that the statute of limitations is tolled "*if an NOI is timely*"). On April 4, 2008, Susan Furr suffered alleged injury, and on April 4, 2010, the final day of the limitations period, plaintiffs Furrs sent a "timely NOI." *Tyra [Furr v McLeod]*, 498 Mich at 76, 79. As in *Furr v McLeod*, the Haksluotos mailed a "timely NOI" on the final day of the limitations period, so the statute of limitations was tolled as in *Furr* and pursuant to *DeCosta*. Unlike *Furr*, the Haksluotos did not prematurely file their complaint within the 182-day NOI tolling period.

Issue: "(2) If the limitations period was tolled in this case, whether the plaintiffs were required to file on the 182nd day of the notice period or the day after the 182nd day in order for

their Complaint to be timely. See MCR 1.108(1) ("the period runs until the end of the . . . day")." *Haksluoto*, __ Mich __; 886 NW2d 718, Appx. 156a.

Short Answer: A plaintiff "shall not commence an action alleging medical practice . . . unless the person has given . . . written notice under this section ***not less than 182 days*** before the action is commenced." MCL 600.2912b(1) (emphasis added). "The last day of the period is included." MCR 1.108(1). When the last day of the period falls on a day the court is closed, "the period runs until the end of the next day." MCR 1.108(1). It would be inconsistent to interpret MCR 1.108(1) to allow, for example, a period ending on December 25, a holiday, to extend to *the end* of December 26, but to prevent a period ending precisely on December 26 from extending to *the end* of December 26. MCR 1.108 "does not provide for divisions or fractions of days," *Haksluoto*, 314 Mich App at 433, Appx. 128a, so day 182 of the tolling period cannot both prevent and permit filing a complaint. "[M]idnight marks the end of one day and the start of another." *Justice v Town of Cicero*, 682 F3d 662, 664 (CA7 2012) (analyzing the federal rule parallel to MCR 1.108(1)). This Court has held that a plaintiff must "wait the full 182-day period before filing his medical malpractice action." *Bush*, 484 Mich at 188; *see also Kincaid*, 300 Mich App at 523-524 ("full 182 days of tolling under MCL 600.5856(c)"); *Waltz v Wyse*, 469 Mich 642, 649; 677 NW2d 813 (2004) ("must wait at least 182 days"). Filing a complaint even "one day prematurely" in violation of the 182-day NOI tolling period fails to commence an action. *Tyra [Furr]*, 498 Mich at 76-77, 79 & n5 (2015); *see also Zwiers v Growney*, 498 Mich 910, 918; 870 NW2d 918 (2015), *reversing* 286 Mich App 38, 45-46; 778 NW2d 81 (2009) (reversing Court of Appeals' decision permitting "suit one day premature in violation of MCL 600.2912b(1).").

Plaintiffs-Appellants respectfully request that this Court affirm the Circuit Court and reverse the reasoning of the Court of Appeals, which finds that a claim is "barred" by the statute of limitations, for purposes of MCL 600.5856(c), during the final day of the limitations period.

STATEMENT OF FACTS

The Complaint in this matter contains allegations of medical malpractice occurring on December 26, 2011. A two year limitations period extended to and included December 26, 2013. Plaintiffs served their Notice of Intent to sue (NOI) on December 26, 2013. Plaintiffs filed their Complaint on June 27, 2014, the day immediately following the final day of the 182-day NOI tolling period.

On July 14, 2014, Defendants filed a motion for summary disposition arguing that Plaintiffs' Complaint was untimely and barred by the statute of limitations. On September 16, 2014, after receiving briefing and hearing arguments, the Circuit Court entered an order denying Defendants' motion for summary disposition. (Cir Ct Order of Sept 16, 2014, Appx. 25a-31a.) The Circuit Court acknowledged a 2004 amendment to the NOI tolling statute found in MCL 600.5856(c) and former MCL 600.5856(d).[1] (Cir Ct Order at 4, Appx. 28a.) The Circuit Court held that the first day of the 182-day notice period was December 27, 2013. (Cir Ct Order at 4, Appx. 28a.) The Circuit Court determined that the final day of the 182-day notice period was June 26, 2014. (Cir Ct Order at 4, Appx. 28a.) The Circuit Court noted that the amended version of MCL 600.5856(c) calls for tolling of the statute of limitations "at the time notice is given." (Cir Ct Order at 5, Appx. 29a.) The Circuit Court reasoned that the amended statute retained the provision that the 182-day notaice period commences "after the date notice is given." (Cir Ct Order at 5, Appx. 29a.) The Circuit Court determined, therefore, that the statute of limitations was immediately tolled "at the time notice is given" and remained tolled for 182 days "after the date notice is given." (Cir Ct Order at 6, Appx. 30a.) The Circuit Court reasoned that both the final provision of MCL 600.5856(c) and MCR 1.108(1) require that the first day of the 182-day tolling

[1] The Circuit Court's opinion cites the prior and amended versions of the statute but erroneously quotes the amended statute when intending to quote the text of the prior statute. Plaintiffs-Appellants have included the text of both the amended and prior versions of the statute, *infra*.

period begins the day after the NOI is served. (Cir Ct Order at 6, Appx. 30a.) The Circuit Court determined that giving effect to both the "at the time notice is given" provision and the "after the date notice is given" provision reconciles amended MCL 600.5856(c) and MCR 1.108(1). (Cir Ct Order at 6, Appx. 30a.)

As applied to this case, the Circuit Court held that the statute of limitations was immediately tolled on December 26, 2013 when Plaintiffs served their NOI; the 182-day notice period then began on December 27, 2013 and the final day of the 182-day tolling period was June 26, 2014; and Plaintiffs properly filed their Complaint on June 27, 2014, the last day remaining in the limitations period following the 182-day tolling period. (Cir Ct Order at 6, Appx. 30a.) Consequently, the Circuit Court denied Defendants' motion for summary disposition. (Cir Ct Order at 6-7, Appx. 30a-31a.)

The Court of Appeals agreed with Plaintiffs and the Circuit Court that pursuant to MCL 600.5856(c), tolling occurs "at the time" the NOI is mailed. The Court of Appeals further noted that immediate tolling only occurs upon mailing the NOI "*if during that period [182 day notice period] a claim would be barred by the statute of limitations or repose*." *Haksluoto*, 314 Mich App at 432, Appx. 128a (citing MCL 600.5856(c), emphasis in original). The Court of Appeals' then found the claim was barred for purposes of MCL 600.5856(c) *while the limitations period was still accessible*.

The Court of Appeals held that Plaintiffs served the NOI "on the last day of the limitations period." *Haksluoto*, 314 Mich App at 433, Appx. 128a. The Court of Appeals held that the 182-day notice period began on December 27, 2013, "the day *after* plaintiffs served the NOI on December 26, 2013." *Id*., at 432, Appx. 128a. ***Then the Court of Appeals found that "we must conclude that the statute of limitations was not tolled in this case due to the fact that it expired one day before the notice period began."*** *Id*., at 434, Appx. 128a (emphasis added).

In other words, the Court of Appeals held that a claim would be barred by the statute of limitations on December 26, 2013, the final day of the available statute of limitations period. The theory that the statute of limitations barred a claim during the open limitations period was never asserted by Defendants. Instead, it was a theory developed by the Court of Appeal, which reversed and remanded for entry of summary disposition on behalf of Defendants "for reasons other than those asserted by defendants." *Id*., at 428, Appx. 126a.

APPLICABLE STANDARDS OF REVIEW

A circuit court's order resolving a motion for summary disposition is reviewed *de novo*. *Driver v Naini*, 490 Mich at 256 (citation omitted). Statutory interpretations are also reviewed *de novo*. *Id*. The primary goal of statutory interpretation is to determine the legislature's intent upon review of the statute's plain language. *Id*. at 246-47. A reviewing court must read the statute within the context of the entire act and ascribe to each word its plain and ordinary meaning. *Id*. at 247. Language that is clear and unambiguous will be applied as written and shall not be subjected to judicial construction. *Id*.

A motion for summary disposition may be filed pursuant to MCR 2.116(C)(7) where the movant asserts that the claims are barred by the statute of limitations. *Fisher Sand & Gravel Co v Neal A Newbie, Inc*, 494 Mich 543, 553; 837 NW2d 244 (2013). A motion pursuant to MCR 2.116(C)(7) does not require supporting material from the moving party or the opposing party, and the complaint is accepted as true unless contradicted by documentation submitted by the moving party. *Id*. (citations omitted). Review of a summary disposition ruling pursuant to MCR 2.116(C)(7) is *de novo*. *Id*. Where there are no disputed facts, the question of whether claims are barred by the statute of limitations is also reviewed *de novo*. *Trentadue v Gorton*, 479 Mich 378, 386; 738 NW2d 664 (2007).

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a complaint and may be properly granted only if the complaint fails to state a claim on which relief can be granted. *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 62-63; 852 NW2d 103 (2014) (citations omitted). A court considers only the pleadings in reviewing a motion pursuant to MCR 2.116(C)(8). *Id*. The reviewing court must accept as true all factual allegations in the complaint and any reasonable inferences or conclusions drawn therefrom. *Id*. Summary disposition is appropriate where no factual development could justify the plaintiff's claims. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). A ruling pursuant to MCR 2.116(C)(8) is reviewed *de novo*. *Id*.

A motion for reconsideration pursuant to MCR 2.119(F) requires a showing of palpable error, the correction of which would result in a different disposition of the motion. *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 515-516; 853 NW2d 481 (2014); MCR 2.119(F). The court rule does not limit the Court's discretion to accept a motion for reconsideration and to correct errors that would otherwise be subject to review on appeal at a much greater cost to the parties. *See Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987); *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986); *Brown v Northville Regional Psychiatric Hosp*, 153 Mich App 300, 308-309; 395 NW2d 18 (1986); MCR 2.119(F)(3) (". . . without restricting the discretion of the court . . .").

PRESERVATION OF ERROR

In order to be preserved for appeal, issues must have been raised before, addressed by, or decided by the circuit court or tribunal below, except that preservation may be disregarded where failure to consider an issue would result in manifest injustice. *See Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005) (citations omitted). Each of Plaintiffs' arguments were raised to the courts below.

ARGUMENT

Plaintiffs-Appellants ("Haksluotos") mailed an NOI within the statute of limitations and then filed their Complaint on the day immediately following the mandatory 182-day tolling period. Because the statute of limitations was tolled "at the time" the NOI was mailed, and because the statute of limitations remained tolled for the full 182-day notice period, Plaintiffs-Appellants timely filed their Complaint the day after the tolling period ended. The Circuit Court's decision correctly analyzed the relevant cases and statutes, including amended MCL 600.5856(c), and should be affirmed by this Court. Plaintiffs address both Defendants-Appellees' ("Mt. Clemens") arguments asserted below as well as the new theory upon which the Court of Appeals based its reversal decision.

Defendants-Appellees' arguments below reveal important misapplications of the limitations and tolling periods affecting medical malpractice complaints. For instance, Defendants-Appellees repeatedly argued that Plaintiffs-Appellants should have filed the Complaint on the final day of the 182-day tolling period. Yet cases such as *Driver v Naini*, 490 Mich at 246 (citation omitted), state that a complaint filed prematurely in violation of the 182-day tolling period fails to commence a medical malpractice action. Defendants-Appellees also improperly considered the 182-day tolling period of MCL 600.5856(c) to be an extension of the two year statute of limitations of MCL 600.5805(6). However, the two periods are fundamentally different. The statute of limitations **requires** filing within the two year period (MCL 600.5805(1)), while the tolling period **prevents** filing within the 182-day period (MCL 600.2912b(1)). The periods serve separate functions of preventing unreasonably delayed claims and allowing for early resolution. These periods cannot be forced together and blithely considered an elongated limitations period. The Court should not accept Defendants-Appellees' invitations below to gloss over important and distinct components of statutes in order to reach a

result that would eliminate part of the statute of limitations period or part of the notice tolling period in medical malpractice cases.

The Court of Appeals held that Plaintiffs served the NOI "on the last day of the limitations period" and that the 182-day notice period began "the day *after* plaintiffs served the NOI." *Haksluoto*, 314 Mich App at 432-33, Appx. 128a. ***The Court of Appeals erred by finding that "we must conclude that the statute of limitations was not tolled in this case due to the fact that it expired one day before the notice period began."*** *Id*., at 434, Appx. 128a (emphasis added). ***In other words, the Court of Appeals held that the statute of limitations would bar a claim during the open statute of limitations period***. The theory that the statute of limitations barred a claim *during the limitations period* is clear error and a substantial injustice to Plaintiffs. The first day "a claim would be barred" by the limitations period is the day *after* the final day within the limitations period. Therefore, tolling occurred "at the time notice is given" on the last day of the limitations period because *the* ***"claim would be barred" during the 182-day notice period (MCL 600.5856(c)), and more specifically, it would be barred on the first day of the 182-day notice period, December 27, 2013.***

The Court of Appeals did not address Defendants' argument that a complaint may be filed on day 182 of the NOI period. However, precedential case law, the relevant statute, and the court rules all support Plaintiffs' position that they were required to wait until the 182-day NOI period ended before filing a medical malpractice complaint.

I. Plaintiffs Timely Served Their NOI Within The Limitations Period And Timely Filed Their Complaint Immediately After The Notice Period.

Plaintiffs timely served their NOI within the statute of limitations period on December 26, 2013. Plaintiffs thereafter observed the full 182-day notice tolling period, which began on December 27, 2013 and extended through and included June 26, 2014. Plaintiffs timely filed their Complaint on June 27, 2014, immediately after the tolling period ended.

A. The Statutes And Rules Relevant To Tolling And Limitations Periods Establish That Plaintiffs-Appellants' Complaint Was Timely Filed.

The statutory framework and court rules establish that the Haksluotos' timely filed their Complaint.

In *Bush v Shabahang*, 484 Mich at 170 (2009), the Court stated that the "former version of § 5856 [] is no longer in existence. The Legislature, in exercising its authority, has changed the language of the statute and we must abide by that action." The Court explained that the modification of § 5856 involved statutory construction requiring the Court to look to the language of the statute; to interpret the language consistent with legislative intent; to give effect to every phrase, clause, and word in the statute; to read the statutory language in its grammatical context unless something else was clearly intended; to read the statute as a whole; to read the statute in the context of the entire legislative scheme; to determine the plain meaning of words; to read the statute in conjunction with other relevant statutes; to read the statute in a manner to ensure harmony with the entire statutory scheme; to pay attention to amendments because changes in the statute are presumed to reflect legislative change in or clarification of the meaning of the statute; and to consider legislative history. *Id*. at 166-68 (citations omitted).

Prior to the amendment effective April 1, 2004, MCL 600.5856 stated, in relevant part:

> The statutes of limitations or reposed are tolled:
> (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.
> * * * * *
> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

After the 2004 amendment, MCL 600.5856 states, in relevant part:

> ***The statutes of limitations or repose are tolled in any of the following circumstances:***
> (a) ***At the time the complaint is filed***, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
> * * * * *

> (c) ***At the time notice is given*** in compliance with the applicable notice period under section 2912b, ***if during that period a claim would be barred by the statute of limitations*** or repose; but in this case, the statute is tolled not longer than the number of days ***remaining in the applicable notice period after the date notice is given***. [Emphasis added.]

Bush dealt specifically with the change from former § 5856(d) to amended § 5856(c), and the Court stated that "it is clear that the focus of the operative language has been clarified." *Id*., 484 Mich at 169. Notably, the Court held that if a plaintiff complies with the notice period for mailing an NOI, "the statute of limitations is tolled." *Id*. The Court did not hold that if one complies with the notice period for serving an NOI, the statute of limitations *would be tolled the next day or some other time in the future*. The Court's statement in *Bush* is justified by the change in language of the statute which now says the statute is tolled "***[a]t the time notice is given***," § 5856(c), while the old statute did not specify when the tolling began, § 5856(d) (pre-2004 version).[2]

This Court in *Swanson v Port Huron Hosp*, 290 Mich App 167, 178; 800 NW2d 101 (2010), reaffirmed the language in *Bush*, 484 Mich at 169, that "the period of limitations is tolled 'at the time notice is given.'" In fact, the Court in *Swanson* repeated at two points in the same sentence the statement that the limitations "is tolled" at the time of notice pursuant to MCL 600.5856(c). *Swanson*, 290 Mich App at 178. Thus, regardless of Mt. Clemens' concern that *Swanson* also decided issues of a defective notice, the case supports the Haksluotos' analysis that amended § 5856(c) and the cases interpreting it call for tolling immediately upon mailing the NOI, and not one or more days after mailing.

Support for interpreting "[a]t the time" as meaning immediate tolling is also found by reviewing other provisions of § 5856. In particular, section 5856(a) states that "[a]t the time" the

[2] Mt. Clemens actually agreed below that "[t]olling began the date that the NOI was served," but Mt. Clemens proceeded to incorrectly argue that no days remained within the statute of limitations. (Defendants' COA Br. Ex. 5 at 2, Appx. 84a.)

complaint is filed, the statutes of limitations and repose are tolled. MCL 600.5856(a). The Haksluotos have found no cases where filing a complaint under MCL 600.5856(a) allowed the limitations period to nonetheless continue to run for a day after the complaint had been filed. That would create an impermissible result where one could file a complaint on the last day of the statutory period but be barred because the statute continued to run until the next day. *See Terrace Land Dev Corp v Seeligson & Jordan*, 250 Mich App 452, 461; 647 NW2d 524 (2002) (quoting *Scarsella v Pollak*, 461 Mich 547, 552 n3; 607 NW2d 711 (2000)) ("In general, of course, a statute of limitations requires only that a complaint be filed within the limitation period."). The interpretation of "at the time," therefore, means that tolling occurs immediately on the day that the filing occurs under § 5856(a) or service of the NOI occurs under § 5856(c).

The "at the time" language of § 5856(a) and (c) performs the same function: it immediately stops the statute of limitations. The language at the end of § 5856(c) performs a different function: it creates a waiting period that encompasses the 182-day notice period of § 2912b "after the date notice is given." The statute of limitations and the 182-day tolling period achieve different objectives. The statute of limitations **requires filing** a complaint within the two year period (MCL 600.5805(1)) to prevent unreasonably delayed claims. The tolling period **prevents filing** a complaint within the 182-day period (MCL 600.2912b(1)) in order to allow the possibility of early resolution of medical malpractice claims. *DeCosta*, 486 Mich at 123-124 (citing and quoting *Bush*, 484 Mich at 174-175, relying on Senate and House Legislative Analysis) (the "true intent" of MCL 600.2912b is "promoting settlement" and "reducing the cost of medical malpractice litigation"). It is sensible that § 5856(a) and (c) should discuss immediate tolling of the statute of limitations "at the time" a complaint is filed or notice is mailed, and that § 5856(c) should separately discuss the 182-day tolling period, where the statute of limitations and the 182-day tolling period serve different purposes.

It is also noteworthy that claims of medical malpractice accrue "at the time" of the act or omission that is the basis for the claim of malpractice. MCL 600.5838(a). If the phrase "at the time" does not mean immediately on the day of the act, then the statute of limitations in this case did not accrue on the alleged date that Defendant Dr. Shapiro misread Plaintiff Jeffrey Haksluoto's CT scan, December 26, 2011. If the phrase "at the time" is defined to mean the day after an event or occurrence, then the claim in this case accrued on December 27, 2011, the next day after Dr. Shapiro's alleged misconduct. This would cause the statute of limitations to end on December 27, 2013 and the Haksluotos served the NOI on December 26, 2013. This leaves the Haksluotos with one extra day to file their claim after June 26, 2014 whether "at the time" is interpreted to mean the same day or is interpreted to mean the day after the event. Either the claim accrues immediately on the same day as the act and tolling occurs in the same manner, or "at the time" means that the critical date is the day after the event and the Haksluotos still had one more day than Mt. Clemens credits to them. The Haksluotos do not agree with the latter interpretation but point it out to show that under either interpretation, the Haksluotos had one remaining day to file their Complaint after the 182-day notice period that tolled the statute of limitations through and including June 26, 2014.

The statute relative to service of an NOI proceeds to state that the statute is tolled for a period not longer than the number of days "remaining in the applicable notice period after the date notice is given." MCL 600.5856(c). In other words, this final component of the § 5856(c) requires that the 182-day notice period begins the day after the NOI is mailed. Therefore, § 5856(c) dictates tolling on the day the NOI is mailed, "at the time notice is given," and then for 182 days starting the day after the NOI is mailed, "after the date notice is given." When an NOI is mailed on the final day of the limitations period, this statutory tolling process leaves *at least*

one day remaining in the two year limitations period, MCL 600.5805(6), after the NOI is served and after the notice period is fully completed.

In the present case, the NOI was served on December 26, 2013. Based upon the opening language of § 5856(c) and the statements of the Court in *Bush*, the statute of limitations was tolled immediately on that day. This left one day of the two year statute of limitations remaining for the Haksluotos to file their Complaint. The closing language of § 5856(c) requires that the 182-day notice period start a day later, on December 27, 2013, which would extend tolling up through and including June 26, 2014.

MCL 600.2912b requires that a plaintiff "shall not commence an action alleging medical practice . . . unless the person has given . . . written notice under this section not less than 182 days before the action is commenced." When the NOI was mailed, the Haksluotos were required to allow 182 days to completely elapse before filing the Complaint. Like the final portion of § 5856(c), Rule 1.108 provides that the computation of this 182-day period begins on the day after the NOI is served and that "[t]he last day of the period is included." MCR 1.108(1). In this case, the day after the NOI was filed was December 27, 2013, and day 182 was June 26, 2014. Therefore, pursuant to MCR 1.108(1) and the final portion of § 5856(c) and the prohibition of § 2912b(1), the Haksluotos could not file the Complaint on June 26, 2014 and were required to wait to file until June 27, 2014, which was one day after the 182-day period.

B. Case Law Published After The Amended Tolling Statute Supports The Timely Filing Of Plaintiffs-Appellants' Complaint.

Case law before and after the amendment of MCL 600.5856 supports the timely filing of the Haksluotos' Complaint, and the amendment itself confirms the timeliness of the Complaint.

Prior to the 2004 amendment clarifying that § 5856(c) immediately tolls the statute of limitations, at least one court interpreted the former corresponding section, § 5856(d), in

accordance with the "at the time" tolling expressly added in the 2004 amendment. In *Crockett v Fieger Fieger Kenney & Johnson, PC*, unpublished opinion *per curiam* of the Court of Appeals, Oct. 28, 2003 (Dkt. No. 240863), 2003 Mich App Lexis 2768, Appx. 157a-158a, the court analyzed the time period for filing under former § 5856(d) in a manner consistent with the 2004 legislative clarification of the statute. In *Crockett*, the court examined the timing of serving an NOI and filing a complaint where the claim began to accrue on April 10, 1996. *Id*. at *3, *5 n1, Appx. 158a. The court determined that if an NOI was sent on the last day of the limitations period, April 10, 1998, the limitations period would have been tolled until Friday, October 9, 1998 pursuant to MCL 600.5856(d), and the plaintiff would have been able to timely file a complaint on the following Monday, October 12, 1998 pursuant to MCR 1.108(1). *Id*. at *5 n1, Appx. 158a. From April 10, 1998 to October 9, 1998 in *Crockett* is exactly the same number of days as December 26, 2013 to June 26, 2014 in the present case. In *Crockett*, the court held that the plaintiff would have one additional day to file after the 182-day period closed when the NOI was filed on the last day of the limitations period. This extended the filing date until October 12, 1998 in *Crockett* because October 10 and 11 fell on the weekend. Here, the one additional day after the 182-day period was June 27, 2014, the date that the Haksluotos filed their Complaint. Thus, *Crockett* is an example of cases before the 2004 amendment clarifying § 5856 that demonstrates that the date the NOI is mailed is removed from the limitations calculus and is retained after the 182-day period computed according to MCR 1.108(1).

After the 2004 amendment to § 5856, the calculation of the 182-day period of tolling continues to be construed as it was in cases like *Crockett*. For instance, in *Burton v Macha*, 303 Mich App 750, 753, 756; 846 NW2d 419 (2014), the Court of Appeals addressed an NOI filed on December 16, 2010. The court analyzed § 5856(c), as amended in 2004, and held as a necessary part of the court's decision on the statute of repose that the 182-day notice period

expired on June 17, 2011. *Id*. at 756-57. Thus, in *Burton* the NOI was filed on December 16, 2010 and the plaintiff could not file a complaint until June 17, 2011. If this Court adds 10 days to the dates in *Burton*, it is the exact case presented by the Haksluotos here. Rather than **December 16 in *Burton***, the NOI was served on **December 26 here**, and rather than an allowable filing date of **June 17 in *Burton***, the allowable filing date was **June 27 here**.[3] *Burton* is a published case that shows the Haksluotos correctly performed the § 5856(c) and MCR 1.108(1) computations.

Other published cases establish that there is time to file a medical malpractice complaint as long as the NOI is mailed within the statute of limitations period.[4] In *DeCosta v Gossage*, 486 Mich at 123, the Court stated that under amended § 5856(c), tolling of the statute of limitations is "determined by the timeliness of the NOI" and if the "NOI is timely, the period of limitations is tolled" without regard to defects in the NOI. The Court of Appeals below expressly cited *DeCosta* and recognized that the statute of limitations is tolled "*if an NOI is timely*." *Haksluoto*, 314 Mich App at 434-35, Appx. 129a. In *Furr v McLeod*, the Court found that on April 4, 2008, Susan Furr suffered alleged injury, and **on April 4, 2010, the final day of the limitations period, the Furrs "sent defendants a *timely NOI*."** *Tyra [Furr]*, 498 Mich at 76, 79 (emphasis added). As in *Furr*, Plaintiffs herein served a "timely NOI" on the final day of the limitations period, so *DeCosta* requires that "the period of limitations is tolled" as it was in *Furr*. Yet, avoiding the error in *Furr*, the Haksluotos did not prematurely file their complaint in the 182-day tolling period. The Court in *DeCosta*, 486 Mich at 123, explained that the NOI mandates were

[3] Note that neither February 2011 in *Burton* nor February 2014 in *Haksluoto* includes a leap year 29th day.

[4] The Court of Appeals has issued a relevant unpublished opinion. *See Gainforth v Bay Health Care*, unpublished opinion *per curiam* of the Court of Appeals, Aug. 11, 2005 (Dkt. No. 260054), 2005 Mich App LEXIS 1952, at *10 & n21, Appx. 164a ("If a plaintiff files a notice of intent to sue within the two-year statute of limitations, however, the limitations period is tolled.").

not intended to impose "extraordinary measures" upon plaintiffs or to result in "exceedingly exacting interpretations" by courts but were meant to give advance notice to defendants and allow early resolution of claims. *Id*. While such flexibility is generally helpful to plaintiffs, here, even an "exceedingly exacting interpretation" of MCL 600.5856(c) actually benefits the Haksluotos because Plaintiffs precisely complied with the statute by timely filing an NOI, as in *Furr*, and are entitled to tolling of the limitations period, as stated in *DeCosta*.

Mt. Clemens' position, that the day of mailing an NOI is a day lost from the statute of limitations, causes plaintiffs to lose a day of the statute of limitations in every medical malpractice case. This is more a matter of Defendants taking creative license than the type of "exceedingly exacting interpretation" of the NOI mandates that the Court in *DeCosta* counseled against. Nothing in the statutory scheme expressly states that the statute of limitations continues to run on the day the NOI is mailed, and the amended § 5856(c) affirmatively states the limitations period is tolled "at the time" the notice is given. Contrary to *DeCosta*, Defendants' position requires an "exceedingly exacting interpretation" of NOI mandates *that do not exist* and compels "extraordinary measures" of mailing an NOI before the last day of the limitations period even though the statutory scheme does not suggest such a requirement and this Court's decisions, as in *Furr* and *DeCosta*, indicate that an NOI is timely filed on the final day of the limitations period and tolls the limitations period.

Kincaid v Cardwell, 300 Mich App at 523-524, also supports the proposition that if an NOI is provided within two years of the accrual of a medical malpractice claim, the plaintiff is entitled to a 182-day notice period. The opinion states that the earliest accrual date for the *Kincaid* claim "was April 25, 2008, and that **she gave her notice to sue within two years of that date. As such, she was entitled to the full 182 days of tolling under MCL 600.5856(c)**." *Id*. (emphasis added). This is precisely the position the Haksluotos take: if one mails an NOI

within the statute of limitations, he is *entitled* to a 182-day notice period. A tolling period would be worthless, and the *Kincaid* opinion meaningless, if one *entitled* to 182 days of tolling reached the end of the period and had "zero days" remaining to file the complaint. *See*, *e.g.*, *Tyra [Furr]*, 498 Mich at 80 ("if the statute of limitations has already expired, the case must be dismissed with prejudice"). What value is there in *entitlement* to tolling to consider settlement when the statute has already run and the claim is already barred? *Kincaid* is only sensible if one who is entitled to 182 days of tolling, by virtue of serving notice within the statute of limitations period, also has opportunity to file his or her complaint following the 182-day waiting period. Here, the Haksluotos reserved one day of the limitations period by timely mailing the NOI within the limitations period, and the Haksluotos filed their Complaint within that one reserved day of the limitations period immediately after the 182-day waiting period. Upon filing the Complaint, the limitations period was again tolled by the action of MCL 600.5856(a) so that even now, there remains one available day in the limitations period for the Haksluotos' claims.

Mt. Clemens continued to argue below that the court in *Kincaid* required the plaintiff to file a complaint within 182 days of June 1, 2010 rather than outside that tolling period. (Defendants' COA Br. at 6-8, Ex. 6 at 3, Appx. 64a-66a, 91a.) In *Kincaid*, the NOI was served on April 5, 2010, which was months prior to the 182-day tolling period reflected in the court's opinion. *Kincaid*, 300 Mich App at 520. Importantly, the court in *Kincaid* did not deal with the immediate tolling required "at the time notice is given," pursuant to MCL 600.5856(c). Instead, *the court worked backward* from the filing date of November 30, 2010 and stated that "if her medical malpractice claim accrued on or after June 1, 2008, which is two years and 182 days before the date she filed her complaint, her claim would be timely." *Kincaid*, 300 Mich App at 524.

The *Kincaid* court did not discuss the dual provisions of MCL 600.5856(c) requiring tolling "at the time notice is given" as well as requiring tolling for the 182 days remaining in the notice period "after the date notice is given." The latest event of malpractice supported by evidence in *Kincaid* was May 7, 2008. *Kincaid*, 300 Mich App at 536. Because of the plaintiff's early NOI sent on April 5, 2010 and a two year limitations period that ended no later than May 7, 2010, the court had no reason to decide whether tolling "at the time notice is given" would have preserved another day in the limitations period. Another day of tolling would have made no difference when the *Kincaid* complaint was filed at least 27 days after the last possible day in the statute of limitations following 182 days of tolling. The court simply did not have reason to address the opening provision of MCL 600.5856(c) calling for immediate tolling "at the time notice is given" when the complaint was several weeks beyond the latest date of timely filing. Contrary to Mt. Clemens' implications below, the *Kincaid* court also made no statement that a plaintiff could file a complaint during the 182-day waiting period in violation of MCL 600.2912b(1). (Defendants' COA Br. at 6-8, Appx. 64a-66a.) *What the court did say is that when one mails an NOI within the two year limitations period, the plaintiff is "entitled" to a* ***full*** *182-day tolling period*. *Kincaid*, 300 Mich App at 523-24 ("entitled to the full 182 days of tolling"). Such a clear statement of entitlement is meaningless if the "entitlement" generates no opportunity to file a complaint after the notice period ends.

Driver v Naini, 490 Mich at 249, supports the Haksluotos' reasoning, stating that "[w]hen a claimant files an NOI with time remaining on the applicable statute of limitations, that NOI tolls the statute of limitations for up to 182 days with regard to the recipients of the NOI." *Id.* (citing MCL 600.5856(c)). The Court in *Driver* did not say that the NOI must be filed a day or two days before the limitations ends. The Court only required "time remaining on the applicable statute of limitations" for the NOI to toll the statute of limitations. *Id.* The Court stated in the

next sentence that this limitations period is normally two years from the time the claim accrues. *Id*. Again, if according to *Driver*, a plaintiff may properly serve an NOI with any time remaining in the two year statute of limitations and get the benefit of tolling during the 182-day notice period, the opinion would be nonsensical if there was not a single day following the 182-day period in which to file a complaint.

Mt. Clemens acknowledged to the Circuit Court the Court's language in *Driver* guaranteeing a 182-day tolling period for NOIs served within the limitations period. (Defendants' COA Br. Ex. 6 at 3, Appx. 91a.) Mt. Clemens' only answer was to suggest that there was no time remaining in the statute of limitations on the day that the Haksluotos mailed their NOI. (Defendants' COA Br. Ex. 6 at 3, Appx. 91a.) However, in the very first paragraph of Mt. Clemens' original motion to dismiss, Mt. Clemens contended that the statute of limitations in this case extended through December 26, 2013. (Defendants' COA Br. Ex. 3 at 1-2, 7, Appx. 74a-75a, 80a.) December 26, 2013 was within the two year statute of limitations, so the Haksluotos mailed their NOI while there was still "time remaining" in the limitations period.[5]

II. The Court Of Appeals Erred In Finding That A Claim Is Barred By The Statute Of Limitations *During* The Available Statute Of Limitations Time Frame.

The Court of Appeals did not accept the arguments of Defendants. Instead, the Court of Appeals imprecisely determined that the statute of limitations "expired" on the last day of the limitations period. The court reasoned that this prevented Plaintiff from having access to the immediate tolling afforded by MCL 600.5856(c) "at the time" the NOI is mailed. The Court of Appeals' ruling must be reversed because there the statute of limitations cannot "bar" a claim *during* the statute of limitations.

[5] Even cases predating the 2004 amendment to MCL 600.5856(c) support the proposition that a plaintiff is entitled to 182 days of tolling as long as the NOI is mailed "before the limitation period expires." *See Waltz v Wyse*, 469 Mich at 646 n6 (citing *Omelenchuk v Warren*, 461 Mich 567; 609 NW2d 177 (2000)).

A. Summary Of Argument In Response To The Court Of Appeals' Opinion.

1. December 26, 2013 was the last day of the statute of limitations, and *Plaintiffs' claims could not have been barred at any time during that day*. MCR 1.108(3).[6]

2. December 27, 2013 was the first day that the statute of limitations could have barred Plaintiffs' claims.

3. The Court of Appeals held that December 27, 2013 was the first day of the NOI period.

4. Under the Court of Appeals' reasoning, if the statute of limitations would bar a claim at some point during the NOI period, then the statute of limitations is tolled "at the time" the NOI is served. *See* MCL 600.5856(c).

5. Plaintiffs' claims could be barred by the statute of limitations no earlier than December 27, 2013, which is "during" the NOI period because *it is the first day of that period*, so the statute of limitations was tolled "at the time" the NOI was served on December 26, 2013. This yielded one remaining day in the limitations period in which Plaintiffs could, *and did*, file their complaint on June 27, 2014, following the 182-day NOI period.

6. Prior published opinions of the Court of Appeals and the Supreme Court indicate that an NOI is timely if it is mailed within the statute of limitations period. The Court of Appeals' opinion in this case unnecessarily contradicts those cases by finding that an NOI mailed within the statute of limitations is not timely.

7. Alternatively, the Court of Appeals' interpretation that a claim is *barred* during the statute of limitations period eliminates an untold number of ongoing or prospective medical malpractice cases, and concepts of equity should prevent the application of the statute of limitations to Plaintiffs' claims and to the pending claims of those similarly situated.

---

[6] Plaintiffs agree and have contended both in briefing and in oral argument below that it is ***inappropriate*** to subdivide days for purposes of counting pursuant to MCR 1.108. The Court of Appeals incorrectly suggests in its opinion that Plaintiffs hope to subdivide December 26, 2013 into a portion that is tolled and a portion that is not. *Haksluoto*, 314 Mich App at 433, Appx. 128a. That is *contrary* to the heart of Plaintiffs' argument that December 26, 2013 was wholly and completely within the statute of limitations and could not be subdivided, split, or otherwise fractured such that the statute of limitations could both run and be tolled or "expire" in the same day. The Court of Appeals correctly noted that any such subdivision is "problematic" because it is "contrary to MCR 1.108, which does not provide for divisions or fractions of days." *Id*.

B. The Court Of Appeals Incorrectly Found That A Claim Is Barred By The Statute Of Limitations *During* The Available Statute Of Limitations Period.

The crux of the Court of Appeals' holding is that MCL 600.5856(c) allows for tolling "at the time" the NOI is served in compliance with the applicable notice period *only* "***if during th[e notice] period a claim would be barred by the statute of limitations or repose***." *Haksluoto*, 314 Mich App at 434, Appx. 128a, citing MCL 600.5856(c) (emphasis added). The Court of Appeals concluded that the NOI period commenced on December 27, 2013, "one day *after* the limitations period had expired." *Haksluoto*, 314 Mich App at 432, Appx. 128a. Consequently, the statute of limitations was not tolled "at the time" Plaintiffs served their NOI. *Id*. at 433, Appx. 128a. The key palpable error in the Court of Appeals' opinion is that its reasoning requires that the statute of limitations *barred* a claim on December 26, 2013, the last day ***still within*** the limitations period.

The Court of Appeals held that "It is undisputed that the two-year statute of limitations expired on December 26, 2013." *Id*. at 432, Appx. 128a. The Court of Appeals' use of the word "expire" is imprecise. "Expire" gives no specific timing. In particular, the word "expire" does not indicate whether the referenced date is *within* the relevant period or is the day immediately *following* the relevant period. If the Court of Appeals meant by "expire" that the statute of limitations ended at some point during December 26, 2013, that is not possible and Plaintiffs have consistently opposed such a position.[7] As the Court of Appeals stated, "the parties agree

[7] An array of cases addressing different areas of substantive law confirm that a claim is not barred on the final day of the limitations period. *See*, *e.g.*, *Creed v Walsh*, 412 Mich 892; 313 N.W.2d 57 (1981) (majority finding auto negligence claim filed within the statute of limitations, and dissent, Coleman, C.J., noting the claim was filed on the "last day" of the limitations period); *Joliet v Pitoniak*, 475 Mich 30, 32; 715 NW2d 60 (2006) (November 30, 2001 complaint of discrimination or misrepresentation could reach November 30, 1998 conduct); *Hanosh v Nick*, 28 Mich App 383, 384; 184 NW2d 570 (1970) (suit commenced on "January 27, 1964, *the final day before expiration* of the applicable statute of limitations" arising from January 27, 1961 auto accident; emphasis added); *Keweenaw Bay Indian Community & Keweenaw Bay Indian Tribal*

that the plaintiffs' claim accrued on December 26, 2011." *Haksluoto*, 314 Mich App at 431, Appx. 127a. Because the two year statute of limitations is measured in years, "the last day of the period is the same day of the month as the day on which the period began," which makes December 26, 2013 the last day *within* the limitations period. MCR 1.108(3); *Dunlap v Sheffield*, 442 Mich 195, 199-200 & n4; 500 NW2d 739 (1993) (when counting a period of years, the last day is the same day of the month as the first day of the period, and this uniform rule of computation "was designed for the ***convenience*** of court, counsel, and parties"; emphasis added).[8] Plaintiffs have consistently stated that December 26, 2013 was included *within* the statute of limitations period as the final day of that period. (Plaintiffs' COA Br. at 2, 11, 18, 21, 22, Appx. 101a, 110a, 117a, 120a, 121a.) Defendants agreed that the statute of limitations extended through December 26, 2013. (Plaintiffs' COA Br. at 18, Appx. 117a, citing Defendants' COA Br. Ex. 3 at 1-2, 7, Appx. 74a-75a, 80a.) The Court of Appeals also recognizes that Plaintiffs service of the NOI on December 26, 2013 was "on the last day of the limitations period." *Haksluoto*, 314 Mich App at 432-33, Appx. 128a. The Court of Appeals

---

Council v Clarke, unpublished opinion *per curiam* of the Court of Appeals, Jan. 11, 2000 (Dkt. No. 214015), 2000 Mich App Lexis 2822, at 15-16, Appx. 174a-175a (defamation complaint "timely filed" on the "last day of the limitation period"); *Telerico v Nowatzke*, unpublished opinion *per curiam* of the Court of Appeals, Jan. 15, 2015 (Dkt. No. 318574), 2015 Mich App Lexis 41, at 3-4, Appx. 180a (if a claim for breach of contract alleged breach on May 19, 2006 or later, the claim "would not be barred" by the limitations period by "timely commenc[ing]" the action on Monday, May 21, 2012 following the end of the six year limitations period on Saturday, May 19, 2012).

[8] This Court's recognition in *Dunlap* that counting the first and last day of a period of years on the same day is a rule of ***convenience***, and this Court's previous recognition in the context of computing a limitations period that it is "the policy of the law to protect a right and prevent a forfeiture," *Collateral Liquidation, Inc v Palm*, 296 Mich 702, 704-705; 296 NW 846 (1941), are both at odds with the Court of Appeals' decision below holding that the Haksluotos' claim "expired," and was therefore barred, *on the final day of the limitations period*. The Court of Appeals has taken a counting rule of *convenience* and an NOI procedure designed to foster *settlement*, *DeCosta*, 486 Mich at 123-124, and has unnecessarily interpreted the two in a manner that compels a *forfeiture* for Plaintiffs, and likely for many others. This Court should apply the interpretations suggested by Plaintiffs to ensure convenience in counting, foster settlement rather than gamesmanship, and avoid unnecessary forfeiture of claims.

confirmed that December 26, 2013 was the last day within the statute of limitations when it stated "We recognize that our analysis means that a plaintiff who serves a NOI ***on the last day of the accessible limitations period*** is legally incapable of filing a timely complaint." *Id*. at 433, Appx. 128a (emphasis added).

Because the parties and the Court of Appeals all agreed that December 26, 2013 was the final day ***within*** the statute of limitations period, it was incorrect for the Court of Appeals to hold, by the word "expire," that the statute of limitations ended at some point during December 26, 2013. It is only possible that the statute of limitations "expired" ***after*** December 26, 2013 after that day. ***To hold that the statute of limitations barred a claim on December 26, 2013 and that the last day of the open statute of limitations was also December 26, 2013, creates an impossible scenario where a filing is both available and "expired" on the same day***. This is inconsistent with the Supreme Court's rules for counting time periods, which do not allow for subdividing days. MCR 1.108. To the extent that the Court of Appeals held that the statute of limitations "expired" on December 26, 2013, which is also the last day within the statute of limitations, the Court of Appeals decision was in error.

Fortunately, it is unnecessary for the courts to base their analyses on the imprecise meaning of "expire" and whether a limitations period can "expire" on the same day it is still open. This is because the relevant tolling statute, MCL 600.5856(c), does not concern itself with the word "expire." Instead, the statute states that tolling occurs "at the time" notice is given in compliance with the NOI period, "**if *during that period* a claim would be *barred* by the statute of limitations or repose**." MCL 600.5856(c) (emphasis added). The key to this provision of MCL 600.5856(c) is finding the day that a claim is "*barred*" by the statute of limitations. December 26, 2013 was the last day of the available limitations period, absent tolling, and December 27, 2013 was the first day outside of the limitations period, absent tolling. The Court

of Appeals held that "the notice period began on December 27, 2013 under MCR 1.108(1)." *Haksluoto*, 314 Mich App at 432, Appx. 128a. Under the framework of the Court of Appeals' analysis, the question is, therefore, whether the statute of limitations *barred* Plaintiffs' claims on December 26, 2013, *prior to the NOI period*, or whether the statute of limitations *barred* Plaintiffs' claims on or after December 27, 2013, *the first day of the NOI period*.

There is only one possible answer: **December 27, 2013 was the first possible day upon which the statute of limitations could have *barred* Plaintiffs' claims. Plaintiffs' claims were not *barred* by the statute of limitations on December 26, 2013 because that day was *within* the limitations period.** As the Court of Appeals determined that ***December 27, 2013 was the first day of the NOI period***, the claim could be *barred* no earlier than the first day of the NOI period. Therefore, the Court of Appeals erred and should have held that Plaintiffs' claims could only have been barred during the NOI period on December 27, 2013, so immediate tolling was proper "at the time" the NOI was served on December 26, 2013. Consequently, Plaintiffs' complaint was timely, and Defendants' motion for summary disposition was properly denied by the esteemed retired Circuit Court Judge, Peter J. Maceroni.

The Court of Appeals opinion of February 18, 2016 is contrary to analyses of the Supreme Court and of at least one other published Court of Appeals decision.

1. In *DeCosta v Gossage*, 486 Mich at 118, 126, the Court's primary opinion stated that "Because plaintiff mailed the NOI before the date the limitations period expired, it was timely." *Id*. (relying upon *Bush*, 484 Mich at 161, 185). The Court further concluded that tolling of the statute of limitations is "determined by the timeliness of the NOI" and if the "NOI is timely, the period of limitations is tolled" without regard to defects in the NOI. *Id*. at 123. The Court's opinion establishes that an NOI is timely if it is mailed during the limitations period. The

DeCosta opinion does not demand an extra day between mailing the NOI and the end of the limitations period, as the Court of Appeals required in the present case. The Court of Appeals below expressly cited *DeCosta* and recognized that the statute of limitations is tolled "*if an NOI is timely*." *Haksluoto*, 314 Mich App at 434-35, Appx. 129a. In *Furr v McLeod*, the Court found that plaintiffs **"sent defendants a *timely NOI*" on the final day of the limitations period**. *Tyra [Furr]*, 498 Mich at 76, 79 (emphasis added). The Haksluotos' claim did not "expire" until December 27, 2013, the first day in which a claim could be barred by the statute of limitations. As in *Furr*, the Haksluotos' claim was filed on the last day of the limitations period. Therefore, pursuant to the language of *DeCosta* and the example of *Furr*, Plaintiffs' NOI was timely and the limitations period was tolled.

2. In *Driver v Naini*, 490 Mich at 249, the Supreme Court states that "[w]hen a claimant files an NOI with time remaining on the applicable statute of limitations, that NOI tolls the statute of limitations for up to 182 days with regard to the recipients of the NOI." *Id*. (citing MCL 600.5856(c)). As in *DeCosta*, the Court in *Driver* does not require an extra day between mailing the NOI and the final day of the limitations period. The NOI is timely as long as there is "time remaining." On December 26, 2013, there was "time remaining" in the statute of limitations throughout that entire day. Plaintiffs made use of that time to mail their NOI. The immediate tolling and 182-day notice period of MCL 600.5856(c) therefore applied.

3. In *Kincaid v Cardwell*, 300 Mich App at 523-524 (2013), the Court of Appeals held that plaintiff "gave her notice to sue within two years of that date. As such,

> she was entitled to the full 182 days of tolling under MCL 600.5856(c)." *Id*. The Court of Appeals also stated that "the period of limitations is tolled for the 182-day notice period, but only if the plaintiff gave the notice before the expiration of the period of limitations." *Id*. at 523. Thus, *Kincaid* states that notice is timely if it was within the limitations period. There was no need for the panel below to contradict a prior published holding of the Court of Appeals by stating that "a plaintiff who serves a NOI on the last day of the limitations period is legally incapable of filing a timely complaint." *Haksluoto*, 314 Mich App at 433, Appx. 128a. The courts can be true to the language of MCL 600.5856(c) in this case without contradicting any prior published decision by accepting that the first day of the 182-day notice period is also the first day a claim would have been barred when the NOI is served on the last day of the limitations period.

The Court of Appeals' opinion imposes an additional time constraint upon plaintiffs that is not necessary to effectuate the language of MCL 600.5856(c) and contradicts prior law of the Court of Appeals and of this Court.

The Court of Appeals' decision affects every active or prospective case in which the NOI was served on the final day of the limitations period. There could be hundreds, or thousands, of claims eliminated by the Court of Appeals' interpretation that a claim is ***barred*** on the last day of the limitations period rather than that the claim is ***barred after*** the final day of the limitations period. There was absolutely no forewarning to medical malpractice attorneys in published case law or statutory law that despite § 5856(c)'s language that tolling would occur "at the time notice is given," an action upon the final day of the limitations period will be considered insufficient to toll the limitations period. There was also no forewarning that a statute of limitations could be active and "expire" on the same day, particularly where the Court of Appeals confirmed that

subdividing a single day for different purposes is "contrary to MCR 1.108, which does not provide for divisions or fractions of days." *Haksluoto*, 314 Mich App at 433, Appx. 128a. In its opinion, the Court of Appeals implicitly recognizes that its analysis establishes for the first time that an NOI filed on the final day of the limitations period will "deadlock" a plaintiff from timely filing a complaint. *Id*. In such circumstances where there was no forewarning, the courts should apply equity to avoid results that are entirely unexpected by members of the Michigan bar and that will devastate claims of plaintiffs with rights to recover for their injuries.

In *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004), the Supreme Court applied equity where there was "understandable confusion" about the legal nature of a claim rather than a "negligent failure to preserve" rights. The issue in *Bryant* was whether the medical malpractice statute of limitations should be allowed to bar claims that appeared to sound in ordinary negligence. *Id*. The Supreme Court held that "for this case and others now pending that involve similar circumstances," the medical malpractice statute of limitations would not act as a bar, but "in future cases of this nature," the statute of limitations would bar the claims. *Id*. at 432-33. Later, in an appellate decision in *Apsey v Mem'l Hosp*, 266 Mich App 666; 702 NW2d 870 (2005), *rev'd on other grounds*, 477 Mich 120; 730 NW2d 695 (2007), the Court of Appeals, upon motion for reconsideration, relied upon *Bryant* and principles of equity to prevent the statute of limitations from barring medical malpractice claims in which the affidavits of merit were held to be technically deficient. *Id*., 266 Mich App at 681-82. The Court of Appeals held that "plaintiffs in the present case, apparently like a significant number of the bar of Michigan, were under the impression that meeting the requirements of the" Uniform Recognition of Acknowledgments Act was sufficient to verify an out-of-state affidavit of merit. *Id*. at 681. The Court of Appeals held that "allowing plaintiffs' claims to proceed best serve justice and equity" and further held that all medical malpractice cases pending in a similar

posture could be relieved of the effects of the statute of limitations by filing a proper certification. *Id*. at 682.

As in *Bryant* and the *Apsey* appellate decision, equity is appropriate here. Plaintiffs in medical malpractice cases commonly make use of the entire statute of limitations based upon the complexity of the cases and the need to meet rigorous procedural hurdles before filing a complaint. There was no published case law, and no case law addressing the current version of § 5856(c), that provided any forewarning that the statute of limitations would expire upon filing an NOI on the final day of the limitations period. Filing an NOI on the final day of the limitations period can at worst be deemed a product of "understandable confusion" regarding the tolling statute. Such filing certainly does not amount to a "negligent failure to preserve rights" where the action was performed within the limitations period without forewarning that such commonplace action would be deemed untimely in spite of the immediate tolling language of § 5856(c). The Court of Appeals' opinion below breaks new ground in that regard. Concepts of equity and justice set forth in *Bryant* and *Apsey* counsel that this Court should give relief from the statute of limitations to Plaintiffs and other medical malpractice plaintiffs or prospective plaintiffs who have mailed an NOI on the final day of the limitations period prior to the Court of Appeals' ruling in this matter.

In summary, a claim cannot be *barred* during the last day of the available limitations period, the Court of Appeals' analysis is contrary to prior published decisions of the Court of Appeals and Supreme Court, and equity should be applied to the untold number of medical malpractice cases or prospective cases in which an NOI was *timely* mailed on the final day of the limitations period.[9] For all of these reasons, Plaintiffs respectfully request that the Court find

[9] Nothing in the legislative scheme governing medical malpractice suits suggests a shortening of the permissible date upon which an action can be commenced. Indeed, the Court of Appeals'

that Plaintiffs claim could not be *barred* during the limitations period, but could only be *barred* the following day on December 27, 2013, that this was *during* the first day of the 182-day NOI period, so MCL 600.5856(c) allowed for immediate tolling "at the time" notice was given on December 26, 2013, and Plaintiffs' claims were timely filed on the date immediately following the 182-day NOI period. Alternatively, Plaintiffs request that the Court apply equity to eliminate the effect of the statute of limitations for Plaintiffs and other plaintiffs or prospective plaintiffs who have already mailed an NOI on the final day of the limitation period.

C. The Decision Below Reaches Beyond Medical Malpractice.

This Court should take into consideration the effect that the Court of Appeals' opinion will have in barring claims outside of medical malpractice when those claims are filed on the final day of the limitations period. One might be tempted to limit the Court of Appeals' holding to the area of medical malpractice based upon § 5856(c)'s repeated references to the NOI notice tolling period, which is unique to medical malpractice cases. However, the Court of Appeals' opinion below reaches beyond medical malpractice because one of its necessary holdings is not unique to medical malpractice cases.

The Court of Appeals below had to answer two critical questions in determining whether § 5856(c) required tolling "at the time" the NOI was served:

1. When did the 182-day "applicable notice period under section 2912b" begin and end? [MCL 600.5856(c) (first phrase).]

2. When would a claim "be barred by the statute of limitations or repose"? [MCL 600.5856(c) (second phrase).]

The Court of Appeals held that tolling occurred "at the time notice is given" only "if during that period," the applicable NOI tolling period, "a claim would be barred." *Haksluoto*, 314 Mich

---

opinion recognizes the novelty of such an untoward consequence, which is not permitted by statute and should be prevented by equity.

App at 434, Appx. 128a. Only by answering both questions could the Court of Appeals determine whether a claim was barred "during" the notice tolling period.

Certainly, the first question is specific to the medical malpractice arena, as the notice tolling provisions of MCL 600.2912b apply, by express statutory language, only to medical malpractice actions. MCL 600.2912b(1).

However, the Court of Appeals' answer to the second question extends to all cases. In every case, jurists and parties must consider "when would a claim be barred by the statute of limitations or repose?" In this case, the Court of Appeals found that the last day of the statute of limitations was December 26, 2013, but also that the statute of limitations "expired" on December 26, 2013, and Plaintiffs' claims were, therefore, barred by the statute of limitations on December 26, 2013. *Haksluoto*, 314 Mich App at 431-33, Appx. 127a-128a. None of these holdings are unique to medical malpractice cases. In every case analyzed under MCL 600.5658(a), courts will have to determine the last day of the limitations period and whether the statute of limitations barred a claim on the final day of the limitations period. Because the Court of Appeals answered in a published opinion that a claim *is barred by the statute of limitations on the last day of the limitations period*, other courts will be constrained to follow this holding. The result will be that *any* complaint filed on the final day of the limitations period will be considered barred by the statute of limitations. The Court of Appeals' reasoning is contrary to cases like *Terrace Land*, which states that the "a statute of limitations requires only that a complaint be filed within the limitation period." *Id*., 250 Mich App at 461 (quoting *Scarsella*, 461 Mich at 552 n3).

If this Court chooses not to overrule the Court of Appeals in *Haksluoto*, courts below will be left with new, controlling precedent holding that claims of any type may be barred by the statute of limitations on the final day of the statute of limitations. Eroding the reliability of the

statute of limitations will likely generate additional disputes testing the true reach of limitations periods in various areas of legal practice. This may in turn generate the need for legislative responses to the lack of certainty in statutes of limitations. All this will be unnecessary if this Court, consistent with cases like *Terrace Land* and *Scarsella*, finds that a statute of limitations is satisfied by action within the limitations period and finds that the Court of Appeals below erred in determining that the Haksluotos' claims were barred on the final day of the limitations period, December 26, 2013.

III. Defendants-Appellees' Arguments Below Were Erroneous And Unpersuasive.

Defendants made arguments to the Circuit Court and Court of Appeals that neither court accepted. While the Court of Appeals based its erroneous decision on something other than Defendants' arguments, Plaintiffs will nonetheless refute Defendants' theories. Defendants-Appellees have relied upon an inapplicable, old version of an amended tolling statute, MCL 600.5856, and case law either interpreting the old version of the statute or actually providing support to Plaintiffs-Appellants' position. Mt. Clemens has come to the erroneous conclusion that the Haksluotos' Complaint is barred by the statute of limitations.

A. Defendants-Appellees Confuse The "Applicable Notice Period" With The Statute of Limitations.

Mt. Clemens quoted § 5856(c), "[t]he statute is not tolled longer than . . . the number of days remaining in the **applicable notice period** after the date notice is given" (emphasis added), and stated that "zero days" remained after the NOI was served. (Defendants' COA Br. at 5, 10, Appx. 63a, 68a.) After the date of mailing the NOI, *182* days remained in the "applicable notice period." Mt. Clemens seems to urge the courts to rewrite the statute to toll for "the number of days remaining in the **applicable statute of limitations** after the date notice is given." Mt. Clemens urges the Court to mistakenly apply the phrase "after the date notice is given" to the

number of days in the statute of limitations rather than applying it to the number of days in the "applicable notice period." By misapplying the "after the date notice is given" phrase, Mt. Clemens intends to shorten the number of days remaining in the statute of limitations. Applying Mt. Clemens' interpretation, the 182-day notice tolling period would be converted to a period equal to the number of days left in the statute of limitations after the date the NOI is filed. Rather than a 182-day period, the resulting notice period could be anywhere from zero days (when the NOI is sent on the last day of the limitations period) to one day less than two years (when the NOI is theoretically sent on the first day of the limitations period). There is no basis to rewrite the statute or to create such a fluctuating notice period.

As written, tolling of the statute of limitations occurs "at the time notice is given" and tolling occurs again for 182 days "after the date notice is given." MCL 600.5856(c). Notice was given on December 26, 2013, so that final day of the limitations period was *tolled*. The 182-day tolling period extended from December 27, 2013 through and including June 26, 2014. The first day following the tolling period was June 27, 2014, and the Haksluotos filed a Complaint on that day. Upon filing the Complaint, the statute of limitations was again *tolled*. MCL 600.5856(a). Thus, the statute of limitations permitted a complaint to be filed on December 26, 2013, tolling began that day upon mailing of the NOI, and there has never been a day from December 26, 2013 to the present to which statutory tolling has not applied. Consequently, the Haksluotos have a day remaining within the statute of limitations even now.

B. Defendants-Appellees' Improperly Relied Upon Inapt Unpublished Case Law And Case Law Interpreting A Prior Version Of The Relevant Tolling Statute.

Below, Mt. Clemens relied upon *Dewan v Khoury*, unpublished opinion *per curiam* of the Court of Appeals, Mar. 28, 2006 (Dkt. No. 265020), leave denied 477 Mich 888; 722 NW2d 215 (2006) (Defendants' COA Br. Ex. 3(C), Appx. 159a-160a). **Notably, Mt. Clemens would like**

this Court to deny the Haksluotos the right to their day in Court on the basis of unpublished opinions that lack precedential value and, in *Dewan*, interpret a previous version of the statute that has been significantly altered. The second footnote of that decision reads as follows: "2004 PA 87, ***effective April 1, 2004***, rewrote MCL 600.5856. The amended version of the statute does not apply in this case." *Id*. at *1 n2, Appx. 159a (emphasis added). Thus, the Court addressed an old version of the statute not applicable here. In *Dewan*, the court relied on the computation of time rules in MCR 1.108 and determined tolling began on the day after the date that the NOI was mailed and included the final date of the 182-day period. *Id*. at *4-5, Appx. 160a. The Court cited MCR 1.108(1) and held that when the NOI was served on June 4, 2004, "*the 182-day tolling period did not begin until June 4, 2004, had passed in its entirety*." *Id*. at *5, Appx. 160a (emphasis added). **The holding created an absurdity within the statutory scheme wherein an NOI was timely filed, but a timely filed complaint was deemed impossible**. The *Dewan* holding directly conflicts with the amended version of the tolling statute.

The difference between the *Dewan* analysis and the present case is not the analysis of the function of MCR 1.108(1), but the modification of the opening language of MCL 600.5856(c) to require tolling immediately upon December 26, 2013. The new "at the time" language of MCL 600.5856(c) prevented the statute of limitations from running on December 26, 2013 and allowed the Haksluotos to retain that day as a day available under the statute of limitations for later filing. In conjunction with the computation of time in MCR 1.108(1) and the final portion of § 5856(c), preventing filing on any of the 182 days up to and including June 26, 2014, the immediate tolling in MCL 600.5856(c) left one remaining day in the statute of limitations for filing on June 27, 2014.

Below, Mt. Clemens cited *Lancaster v Wease*, unpublished op. *per curiam* of the Court of Appeals, Sept. 28, 2010 (Dkt. No. 291931) (Appx. 176a-178a), for the proposition that the plaintiff had only one day to file a complaint after the notice period even though she mailed an NOI a day before the limitations period expired. (Defendants' COA Br. at 11-12, Ex. 9, Appx. 69a-70a, 176a-178a.) However, the *Lancaster* opinion states that "when the notice period expired on May 28, 2008, the period of limitations resumed running," and footnote two of that opinion clarifies the limitations period resumed running on May 28, 2008. *Id*. at *4 and n2, Appx. 177a. The court then stated that the plaintiff filed suit one day late on May 30, 2008. *Id*. at *4, Appx. 177a. While not a picture of clarity, the opinion gave the plaintiff *two days* to file after the notice period, May 28 and 29, where she had served an NOI the day before the final day of the limitations period. This supports the Haksluotos' position that when the NOI is served on the final day of the limitations period, the plaintiff still has *one* day to file a complaint after the 182-day tolling period.[10]

C. Defendants-Appellees Ignored Substantial Precedent In Erroneously Arguing That A Medical-Malpractice Limitations Period Is Not Tolled For A Full 182 Days Following Service Of The Notice Of Intent To Sue.

In its November 23, 2016 order granting leave to appeal, this Court specifically instructed the parties to brief the following issue: "(2) if the limitations period was tolled in this case, whether the plaintiffs were required to file on the 182nd day of the notice period or the day after the 182nd day in order for their Complaint to be timely." *Haksluoto*, __ Mich __; 886 NW2d

[10] Mt. Clemens cited below the inapposite decision in *Hardin v Prieskorn*, unpublished op. *per curiam* of the Court of Appeals, Apr. 1, 2014 (Dkt. No. 311193), Appx. 168a-169a. (Defendants' COA Br. at 12-13, Ex. 10, Appx. 170a-171a.) *Hardin* involved a contested agreement to toll the limitations period. The case did not require the court to decide whether the limitations period resumed on the final day of the 182-day notice period, February 1, 2012, or on the day immediately following the 182-day period, February 2, 2012, because the complaint was not filed until February 10, 2012, well after either date. The opinion addressed whether the tolling agreement was binding, not the manner of calculating time pursuant to § 5856(c), so it bears no value to this case.

718, Appx. 156a (citing MCR 1.108(1) ("the period runs until the end of the . . . day")). Mt. Clemens appeared to concede on appeal below that after mailing an NOI on December 26, 2013, the Haksluotos still had the opportunity to file suit, but Mt. Clemens erroneously suggested that the Haksluotos should have filed the Complaint on the last day of the 182-day tolling period.[11] Mt. Clemens position is contrary to statute, court rule, and a substantial number of published appellate opinions.

MCL 600.2912b(1) requires that a plaintiff "shall not commence an action alleging medical practice . . . unless the person has given . . . written notice under this section not less than 182 days before the action is commenced." Mt. Clemens stood this passage on its head and stated that when an NOI is served, "a plaintiff must file suit no later than 182 days thereafter." (Defendants' COA Br. at 4, Appx. 62a; *see also* Defendants' Response to MSC Leave Application at 11, Appx. 150a ("Plaintiffs-Appellants could file suit on 6/26/14 because Day 182 of the tolling period fell on, 'not less than 182 days.'").) "Not less than" means that the Haksluotos were required to allow 182 days to completely elapse before filing the Complaint. While the statute expressly states that filing cannot occur within the 182-day tolling period, Mt. Clemens took the position below that it *must* be filed within the 182-day tolling period.

Like the final portion of § 5856(c), Rule 1.108 provides that the computation of this 182-day period begins on the day after the NOI is served and it goes on to say that "[t]he last day of the period is included." MCR 1.108(1). The court rule should not be read in a manner to create a conflict with the statute, but if there is an irreconcilable conflict, the court rule controls over the statute because the limitations period is a matter of court practice or procedure under the

[11] *See* Defendants' COA Br. in Support of Leave at 5, row 3 of the chart, and at 8, Appx. 45a, 48a. In its Brief on Appeal and Response to Application for Leave to this Court, Mt. Clemens modified its earlier chart, which conceded that "Plaintiffs could have filed suit," but continues to insist that Plaintiffs were required to file their Complaint on day 182 of the MCL 600.2912b(1) waiting period. Defendants' COA Br. at 6, 8-9, Appx. 64a, 66a-67a; Defendants' Response to MSC Leave Application at 8-9, 11-12, Appx. 147a-148a, 150a-151a.

Supreme Court's exclusive authority. *See People v Watkins*, 491 Mich 450, 467, 472-73; 818 NW2d 296 (2012) (quoting Const 1963, Art 6, § 5, re Court's authority to "establish, modify, amend and simplify the practice and procedure in all courts of this state"); *also People v Sinclair*, 247 Mich App 685, 689; 638 NW2d 120 (2001) (citing Const 1963, Art 6, § 5 as compelling application of MCR 1.108 when computing a period of time). In this case, the day after the NOI was filed was December 27, 2013, and day 182 was June 26, 2014. Here, there is no conflict between the court rule and statutes: each requires that tolling continue throughout the final day of the 182-day period. Therefore, pursuant to MCR 1.108(1), the final portion of § 5856(c), and MCL 600.2912b(1), the Haksluotos could not file the Complaint on June 26, 2014 and were required to wait until June 27, 2014, which was one day after the 182-day tolling period ended.

Various cases establish that the notice provision of MCL 600.2912b, in combination with the tolling provisions of MCL 600.5856, results in tolling for the full 182 days. In *Potter v McLeary*, 484 Mich 397, 405; 774 NW2d 1 (2009) (emphasis added), the Supreme Court quoted this Court's statement that "the period of limitations would have been ***tolled for 182 days*** from the date of the notice" pursuant to MCL 600.2912b(1). In *Bush*, 484 Mich at 188; also 482 Mich 1105; 758 NW2d 267 (2008) (emphasis added), the Court cited MCL 600.2912b and MCL 600.5856 and stated within its formulation of the question to be addressed that the plaintiff "was required to ***wait the full 182-day period*** before filing his medical malpractice action." *See also Kincaid*, 300 Mich App at 523-524 (plaintiff "entitled to the ***full*** 182 days of tolling under MCL 600.5856(c)"; emphasis added).

In *Waltz v Wyse*, 469 Mich at 646 n6 (2004) (citing *Omelenchuk*, 461 Mich 567) (emphasis added), the Court cited MCL 600.2912b and MCL 600.5856 and stated that "the limitation period ***is tolled for 182 days*** if the plaintiff provides a valid notice of intent before the limitation period expires." The Court went on to discuss the fact that a plaintiff "***must wait at***

least 182 days after" sending the NOI and that the 182-day notice period is an "***interval when a potential plaintiff is not allowed to commence an action***," and then the Court repeated that "the period of limitations ***is tolled for 182 days***." *Id*. at 649 (citing MCL 600.2912b; MCL 600.5856; *Omelenchuk*, 461 Mich at 574-75) (emphasis added). Indeed, there is a substantial risk that one's complaint will be dismissed as ineffective or premature if it is filed before the full 182-day waiting period ends. *Driver*, 490 Mich at 256 ("when a plaintiff fails to strictly comply with the notice waiting period under MCL 600.2912b, his or her prematurely filed complaint fails to commence an action that tolls the statute of limitations").

In *Tyra v Organ Procurement Agency of Mich [also Furr v McLeod]*, 498 Mich at 79-80, 91-92, 94 (2015), the Court held that "[a] complaint filed before the expiration of the notice period violates MCL 600.2912b and is ineffective to toll the limitations period"; that "filing of their complaints before the expiration of the NOI waiting period did not commence their actions or toll the running of the limitations period"; and that a complaint must be filed "after the applicable notice period has expired, but before the period of limitations has expired." With respect to facts of the *Furr* matter, jointly decided with *Tyra*, the Court noted some disagreement about whether the complaint was filed several days prematurely (on day 179 after serving the NOI), it was "undisputed that the complaint was filed at least one day prematurely." *Tyra [Furr]*, 498 Mich at 76-77 & n5. Thus, the Court held the complaint to be premature whether it was filed one day early or several days early. In *Zwiers v Growney*, 286 Mich App at 45-46 (2009), the Court of Appeals applied MCL 600.2301 to overcome dismissal where the plaintiff "filed suit one day premature in violation of MCL 600.2912b(1)." However, in *Zwiers v Growney*, 498 Mich at 918 (2015), this Court peremptorily reversed the Court of Appeals on the basis of *Tyra/Furr*, stating that "[a] medical malpractice complaint filed before the expiration of the 182-day notice period is ineffective to toll the statute of limitations." Thus, even where the

courts have addressed a complaint being filed even one day prematurely within the 182-day NOI period, this Court has found the complaint insufficient to commence the case.

Mt. Clemens ignores these authorities and postures that the Haksluotos must file their Complaint on day 182 of the notice period. The authorities above establish that the Haksluotos must file on day 183 ***after*** the 182-day tolling period has fully elapsed. Mt. Clemens' argument that the 182nd day may be used for filing is also contrary to MCR 1.108(1), which indicates that the "last day of the period is included," and when the last day falls on a day the court is closed, "the period runs until the end of the next day." MCR 1.108(1); *see also Haksluoto*, __ Mich __; 886 NW2d 718, Appx. 156a (citing MCR 1.108(1) ("the period runs until the end of the . . . day")); *Dep't of Human Servs v Chester (In re Chester)*, 477 Mich 1012, 1012-14; 726 NW2d 411 (2007), Kelly, J., concurring, and Corrigan and Young, JJ., dissenting (agreeing that pursuant to MCR 1.108(1), "the period runs until the end of the next day" after a holiday); *Shawl v Spence Bros, Inc*, 280 Mich App 213, 221-222; 760 NW2d 674 (2008) (pursuant to MCR 1.108(1), defendants "had until the end of Monday" to act). The computation rules of MCR 1.108(1) apply "in all cases," including cases in which a period of weeks, months, or years is being analyzed. *Dunlap v Sheffield*, 442 Mich at 199-200 & n6 (1993).

It would be inconsistent to interpret the period to run "*until the end of the next day*" when the court was closed on the final day of the period, but to interpret the period to run for *only part of the final day* when the court is open on that final day. The Court of Appeals has confirmed in at least one published case, *the present case*, that subdividing a single day for different purposes is "contrary to MCR 1.108, which does not provide for divisions or fractions of days." *Haksluoto*, 314 Mich App at 433, Appx. 128a. This Court has previously looked to case law and commentary discussing federal rules where a federal rule parallels the text of a Michigan rule. *People v Vandervliet*, 444 Mich 52, 60 n7; 508 NW2d 114 (1993). Federal Rule

of Civil Procedure ("FRCP") 6(a)(1)(C) is substantially similar to MCR 1.108(1). In analyzing when a day ends pursuant to FRCP 6(a), Chief Judge Easterbrook of the United States Seventh Circuit Court of Appeals stated that "it does not take a reference to *Cinderella* to show that midnight marks the end of one day and the start of another." *Justice v Town of Cicero*, 682 F3d 662, 664 (CA7 2012). It should be equally apparent to the people and jurists of Michigan, without resort to children's fairytales, that the "last day" ends at midnight.

The Court of Appeals' opinion below highlights the inconsistency when periods are not uniformly measured to "the end of the . . . day" under MCR 1.108(1). The Court of Appeals held that the limitations period "expired" on December 26, 2013, the last day of the limitations period, and therefore prevented tolling and barred Plaintiffs' claims. *Haksluoto*, 314 Mich App at 431-33, Appx. 127a-128a. If the final day of the limitations period here had been scheduled for a holiday or weekend, rather than Thursday, December 26, 2013, then MCR 1.108(1) would have expressly permitted action within the period "until the end of the next day." **The Court of Appeals found that the last day within the limitations period was December 26, but at some point on December 26, the claim "expired" and became barred. Yet, if the last day of the limitations period was December 25, a holiday, then MCR 1.108(1) would expressly extend the period "until the end of" December 26 and Plaintiffs' claims could not be barred until December 27. The inconsistent result is that a limitation period ending on December 26 would face statutory bar prior in time to a limitation period ending on December 25.** The Court of Appeals' subdivision of December 26 such that the statute of limitations could both run and also bar a claim in the same day contradicts the Court of Appeals' holding that "divisions or fractions of days" are impermissible under MCR 1.108. *Haksluoto*, 314 Mich App at 433, Appx. 128a. The court's subdivision of the final day of the limitations period also creates an inconsistency wherein MCR 1.108(1) prevents the claim from becoming barred at any time

before December 26 ends if the final day of the period were December 25, but the Court of Appeals found that the claim was barred at some point during December 26 where the final day of the period was December 26.

MCR 1.108(1) establishes that a period runs "until the end of the . . . day," including the "last day," which is day 182 of the NOI period here. The court rule controls the computation even if there were a conflicting statute. *Watkins*, 491 Mich at 467, 472-73; *Sinclair*, 247 Mich App at 689. However, the MCL 600.2912b(1) statement that a plaintiff must wait "not less than 182 days" *does not conflict* with the MCR 1.108(1) statements that the "last day of the period is included" and "the period runs until the end of the . . . day." Indeed, the requirement of MCL 600.2912b(1) to wait "not less than 182 days" would be violated if a plaintiff waited only 181.5 days, 181.3 days, or some other fraction of the final day. If the Legislature intended that a medical malpractice claim could be filed starting on day 182, the Legislature could have required that a plaintiff wait "until the 182nd day" or "may file on day 182" or similar language. By requiring a plaintiff to wait "not less than 182 days," the statute rules out filing before day 182 is complete. Both the statute and the court rule may and must be interpreted to require the period to run until the end of the last day of the period.

By timely serving the NOI and achieving tolling on December 26, 2013, the Haksluotos retained an available day within the statute of limitations to file on day 183 after the 182-day NOI period was fully complete. This does not extend a 182-day tolling period to 183 days. Instead, it allows for the reconciliation of the § 5856(c) initial statement, that tolling begins "at the time" notice is given, with the final statement of § 5856(c) and with MCR 1.108(1)'s method of counting days. Combining the immediate tolling of § 5856(c) with the method for computing a period of days under 1.108(1), and incorporated into the final passage of § 5856(c), leads to a Complaint that was due for

filing on June 27, 2014 in this case. Precisely the same time frame was endorsed in *Crockett* before the § 5856(c) clarifying amendment and in *Burton* after the § 5856(c) clarifying amendment.

CONCLUSION

Amended § 5856(c) clarifies that tolling of the statute of limitations is immediately effective on the day, or "at the time," that the NOI is filed if the claim would be barred at some point during the NOI tolling period. MCR 1.108(1) and the final provision of § 5856(c) cause a 182-day tolling period to begin the day after the NOI is filed. The first day in which the statute of limitations could bar Plaintiffs' claim was also the first day of the NOI period, December 27, 2013. MCL 600.5856(c). MCR 1.108(1) and the numerous cases cited, *supra*, restrict a plaintiff from filing a complaint before the end of the 182nd day of the NOI period. The sum of the statute, court rule, and cases is that the statute of limitations was tolled on December 26, 2013 when the Haksluotos mailed the NOI; that final day of the open limitations period was preserved for future use; the 182-day NOI tolling period extended from December 27, 2013 to and including June 26, 2014; on Friday, June 27, 2014, the Haksluotos were free to file their Complaint and did so; and the filing of the Complaint again tolled the statute of limitations. *From the final day of the limitations period on December 26, 2013 to the present, there is not a day when the statute of limitations was not tolled*.

The Court of Appeals' opinion was flawed in that it held that a claim is barred by the statute of limitations on the last day of the limitations period because the limitations period "expired." This ruling cannot be allowed to stand in medical malpractice cases or any case. Whether in medical malpractice cases or otherwise, the final day of the limitations period is just as valid a day to take action as the first day of the limitations period and any day between the first and the last. Furthermore, the court rule, statute, and cases are clear that a medical malpractice claim must not be filed until the 182-day NOI tolling period has ended. Therefore,

Plaintiffs timely served the NOI on the final day of the limitations period and timely filed their Complaint on the day immediately after the NOI tolling period ended. Plaintiffs-Appellants respectfully request that this Honorable Court reverse the Court of Appeals and affirm the Circuit Court. In the alternative, Plaintiffs ask the Court to apply concepts of equity and justice to give relief from the statute of limitations to Plaintiffs and other medical malpractice plaintiffs or prospective plaintiffs who mailed an NOI on the final day of the limitations period prior to the Court of Appeals' novel ruling in this matter.

Respectfully submitted,

HERTZ SCHRAM PC

By: */s/ Daniel W. Rucker*

Steve J. Weiss (P32174)
Daniel W. Rucker (P67832)
Attorneys for Plaintiffs-Appellants
1760 S. Telegraph Road, Suite 300
Bloomfield Hills, MI 48302
(248) 335-5000
drucker@hertzschram.com

Dated: January 17, 2017